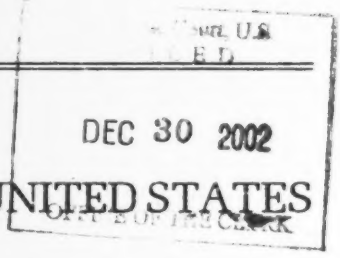
No. 02-712



In the
SUPREME COURT OF THE UNITED STATES

SHAWNEE PATTEN,

Petitioner,

v.

WAL-MART STORES EAST, INC.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

REPLY TO BRIEF IN OPPOSITION

John P. Gause
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QUESTION PRESENTED

Whether petitioner has proven a violation of Title I of the Americans with Disabilities Act if she establishes by a preponderance of the evidence, direct or circumstantial, that her disability was "a motivating factor" in an adverse employment action.

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ARGUMENT

Wal-Mart raises the new argument in its Opposition that Patten somehow waived her right to request an "a motivating factor" instruction at trial because she did not object to the Magistrate's Recommended Decision on Wal-Mart's motion for summary judgment. Patten is not appealing the failure to give an "a motivating factor" instruction based on Patten's presentation of direct evidence; rather, Patten argues that the standard of "a motivating factor" should apply in cases relying exclusively on circumstantial evidence as well as those relying on direct evidence. There can be no argument that this issue was waived.

The Recommended Decision did not address the applicability of an "a motivating factor" instruction to circumstantial-evidence cases. It did not enter or recommend any type of an order limiting Patten's ability to request an "a motivating factor" instruction at trial. The trial court certainly was not under the impression that Patten was precluded from requesting her jury instruction, as is illustrated by the discussion following Patten's request. The Judge analyzed Patten's request for an "a motivating factor" instruction in light of the evidence introduced at trial.

In any event, this Court has held that, "the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing--that the case should go to trial." Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc., 87 S.Ct. 193, 195 (1966). The Third Circuit Court of Appeals has recognized that a court's rejection of a mixed-motive analysis at the summary judgment stage, in the context of the denial of summary judgment based on a pretext analysis, does not bar plaintiff from relying on a mixed motive theory at trial:

> We do not mean to suggest that an employee must elect to proceed on

> either a pretext or a Price Waterhouse theory at trial. Rather, we think that an employee may present his case under both theories and the district court must then decide whether one or both theories properly apply at some point in the proceedings prior to instructing the jury. While evidence here presented to us at the summary judgment stage does not trigger the Price Waterhouse framework, the evidence presented during trial may.

Armbruster v. Unisys Corp., 32 F.3d 768, 782 n. 17 (3rd Cir. 1994) (citations and quotations omitted) *abrogated on other grounds by* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 277 (3rd Cir. 1998). See also Finch v. Hercules Inc., 865 F.Supp. 1104, 1123 (D.Del. 1994) ("[E]ven if there are no genuine issues of material fact as to one of the two modes of analysis, [mixed motive or pretext,] plaintiff still may present evidence at trial which makes that mode of analysis appropriate.").

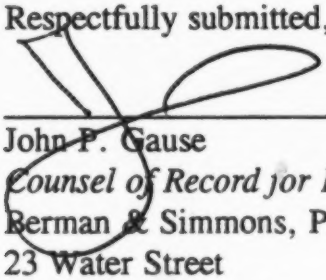
Because the Recommended Decision in no way limited Patten's ability to argue for an "a motivating factor" instruction based on circumstantial evidence, the fact that Patten did not object to the Decision did not bar her requested jury instruction.

CONCLUSION

For the foregoing reasons, together with those set forth in the petition for writ of certiorari, the petition for writ of certiorari should be granted.

Dated: December 18, 2002

Respectfully submitted,



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